Supreme Court, U.S.
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No. 00-322

In The
Supreme Court of the United States

October Term, 2000

ALVIN EUGENE COATES,

Petitioner,

v.

VIRGINIA POWER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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26pp

QUESTION PRESENTED

Did the Court of Appeals err in affirming the District Court's determination that Coates failed to adduce sufficient evidence supporting his race discrimination claim to raise a genuine issue of material fact and Virginia Power was entitled to judgment in its favor as a matter of law?

RULE 29.6 DISCLOSURE

Dominion Resources, Inc. is the parent of Respondent Virginia Electric and Power Company and owns all of its stock.

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Virginia Electric and Power Company ("Virginia Power," incorrectly named in the caption as Virginia Power Company) respectfully submits that the Petition for Certiorari filed by Alvin Eugene Coates ("Coates") should be denied.[1]

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[1] Virginia Power concurs in Coates' statement of jurisdiction. This Brief cites the opinions below by reference to the Appendix to Coates' Petition, pages 1a to 19a, as corrected by the Appendix to this Brief, pages A-1 to A-4.

OPINIONS BELOW

Virginia Power concurs in Coates' description of the opinions below but states that the reproductions of those opinions in the Appendix to Coates' Petition contain numerous errors. The Appendix to this Brief provides corrections to the more significant or potentially confusing errors. Virginia Power notes that the full text of the unreported Court of Appeals opinion is available at 2000 U.S. App. LEXIS 8619, at 2000 Westlaw 524802, and at the web site of the United States Court of Appeals for the Fourth Circuit at http://207.41.17.117/ISYSquery/IRL5D81.tmp/1/doc.

STATUTE INVOLVED

Coates brought his claim pursuant to the Civil Rights Act of 1866, 42 U.S.C. § 1981:

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

The statute that is set forth in Coates' Petition, 42 U.S.C. § 2000e-2, is in issue in this action only insofar as certain claims under that statute are governed by the same principles as certain claims under 42 U.S.C. § 1981.

STATEMENT OF THE CASE

I. Factual Background

Due to changes in the regulatory and technological environment, electric utilities must operate in an increasingly competitive marketplace. To ensure its success in this marketplace, Virginia Power undertook a project called Vision 2000 to review the company's operations and business practices. Vision 2000 was not a staffing study as such, but as it analyzed the company's organizational and operational needs and the potential for measures such as re-engineering and changes in work processes, the Vision 2000 process identified hundreds of positions that should be eliminated.

As new positions were designed for the reorganized operation and existing positions were eliminated, Virginia Power "pooled" the employees who were to be considered for the new positions. In the pooling process, employees were rated on the knowledge, skills, and abilities ("KSAs") relevant to the new position. The ratings were multiplied by appropriate weights for each KSA criterion, and the resulting overall scores were then compared to rank the employees. Employees who were not placed in positions through pooling or other reorganization processes were terminated.

Coates was a Construction Supervisor in Virginia Power's Woodbridge District from 1994 to 1997. When the Region that included the Woodbridge District was reorganized, a number of Construction Supervisor positions were eliminated. Thus, Coates and other Construction Supervisors in the Region were considered, through the pooling process, for the appropriate positions in the reorganized operation. These positions were in eight job classifications, in various locations. Coates and the other employees in the pools were all rated on the KSAs relevant to those positions.

The KSAs consisted of two parts: "baseline assessments" on five factors that were relevant to consideration for any position, and "job-specific KSAs" on three factors for each position for which the employee was pooled. In August 1996, Coates' immediate supervisor, Ed Bushee, prepared baseline assessments of Coates and the other Woodbridge Construction Supervisors. In March 1997, Bushee prepared the job-specific KSAs of Coates and the other Woodbridge Construction Supervisors.

While the job-specific KSAs were being prepared, Marty Travis, Bushee's immediate supervisor, was instructed to review the baseline assessments of the Woodbridge employees to see whether any should be revised in view of any occurrences since August 1996. During that period, Coates had been involved in a number of occurrences which Travis believed should affect Coates' baseline assessments: Coates had had problems in dealing with customers, with the crew he supervised, with safety issues, and with employees in the Customer Service group. Because of those occurrences, Travis began preparing a revised version of Coates' baseline assessments.

After the job-specific KSAs had been prepared, Travis met with Bushee to discuss the possible revisions to Coates' baseline assessments. In this discussion, Bushee did not suggest that Travis' concerns about Coates' recent job performance were not valid, but Bushee said he believed it was not appropriate to change the baseline assessments because of the events in the past months; they should be based instead on a longer period.

Travis decided to follow this advice and not to revise Coates' baseline assessments. Travis placed the revised version in his desk drawer and did not submit it to be used in the pooling and selection process. Thus, the original baseline assessments that Bushee had prepared in August 1996, together with the job-specific KSAs that Bushee had prepared before meeting with Travis about possible revisions to the baseline assessments, were used in the pooling process.

After the ratings and rankings were compiled, the Managers who would be managing the reorganized Region met to select the employees for their new organizations. In the pool for each job classification, there were substantially more candidates than positions available. On the KSA rating and ranking charts that the Managers used in the meeting, the baseline assessment ratings for Coates were the August 1996 ratings Bushee had prepared, not the proposed revised ratings Travis had placed in his drawer.[2]

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[2] Virginia Power notes, in accordance with Sup. Ct. R. 15.2, that Coates' Petition misstates the facts regarding the preparation, proposed revision, and use of the KSAs.

In Coates' former location, Woodbridge, the Managers involved selected two Supervisors who are white and one who is African-American. Travis, whom Coates accuses of race discrimination, also selected for his new organization two Supervisors who are white and one who is African-American. None of the more than 20 Managers in the meeting selected Coates for a position in his or her new organization, and none of them expressed any interest in selecting Coates for a position. Thus, Coates was one of nine Construction Supervisors in the Region who were terminated due to the reorganization. Of the other eight, one is Hispanic and the others are white.

II. Proceedings in the Lower Courts

In Coates' deposition, counsel for Virginia Power asked him to state the complete factual basis for his claims in this lawsuit. Coates testified that he believed Travis alone had caused his termination. When asked whether he believed that Travis had done this because of his race, Coates answered, "I can't answer that either because I don't know the reason he did it or not, I don't know." Coates testified that before meeting Travis, he developed a "gut feeling" that Travis was a racist and a "redneck." The deposition then included this exchange:

> Q. What is it that indicates Marty Travis is a redneck?
>
> A. Behavior.
>
> Q. What behavior?
>
> A. His behavior. I've been around him all my career.
>
> Q. What kind of behavior?
>
> A. I can't be specific to you. I know.

Near the end of his deposition, Coates confirmed that during the deposition he had stated all the facts and circumstances that he believed supported his claims in this lawsuit.

After the close of discovery, Virginia Power moved for summary judgment, asserting that Coates' claims were based entirely on speculation. Coates then filed a declaration describing some allegedly discriminatory actions by Travis which Coates had not mentioned in his deposition.[3] In response, Virginia Power noted that insofar as Coates' declaration contradicted his deposition and contained conclusory assertions and speculation not based on personal knowledge, it should be disregarded. (*See* 17a-18a). Virginia Power also argued that even if the declaration was considered, it did not raise a genuine issue of material fact.

In a nine-page opinion, the District Court thoroughly analyzed Coates' claims and granted the motion for summary judgment. (9a-18a). The District Court noted that in deciding a motion for summary judgment, the evidence presented must always be construed in the light most favorable to the non-moving party. (14a). The District Court found a dispute in the evidence as to two elements of Coates' *prima facie* case of discrimination and so, taking the evidence in the light most favorable to Coates, found that Coates had made out a *prima facie* case. (15a). The District Court found, however, "absolutely no indication that Virginia Power's offered legitimate

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[3] The alleged facts set forth in the two paragraphs at the bottom of page 6 and top of page 7 of Coates' Petition all fall into this category. Virginia Power states, in accordance with Sup. Ct. R. 15.2, that there is no competent evidence in the record to support most of those factual assertions.

non-discriminatory explanation for their action is pretextual." (16a). The undisputed facts showed that Virginia Power had terminated Coates' employment because of a reorganization that led to the elimination of hundreds of positions; Coates had not offered any evidence to suggest that race was a consideration in the selection process for the new organization; and Coates' claim that Virginia Power's explanation for its actions was a pretext for race discrimination amounted to "mere speculation" which cannot defeat a motion for summary judgment. (16a-17a).

On *de novo* review, the Court of Appeals unanimously affirmed. (1a-7a). Viewing the evidence in the light most favorable to Coates, the Court of Appeals found that Coates had made out a *prima facie* case of discrimination. (6a). The Court found, however, that Coates had "adduced no evidence" indicating that Virginia Power's explanation for its actions was pretextual. (*Id.*). "Throughout his arguments, Coates merely speculates that Virginia Power's legitimate, non-discriminatory reason for its conduct is actually a pretext for discrimination." (7a).

Coates filed a petition for rehearing and suggestion for rehearing *en banc*. No member of the Court of Appeals requested a poll on the suggestion for rehearing *en banc*, and the petition was denied. (19a). This Petition followed.

REASONS FOR DENYING THE WRIT

This case does not present any "compelling reasons," as required by Supreme Court Rule 10, for this Court to exercise its discretionary jurisdiction on a petition for certiorari. This is simply a routine case in which a Court of Appeals affirmed, without dissent, a District Court's finding

that a plaintiff alleging employment discrimination failed to adduce sufficient evidence to raise a genuine issue of material fact. The lower courts' decisions do not raise any novel issues, are not in conflict with any decisions of this Court, and do not raise a conflict among the Courts of different Circuits. The Petition for Certiorari accordingly should be denied.

I. The Lower Courts' Decisions Do Not Conflict with *Reeves v. Sanderson Plumbing Products, Inc.*

Coates' primary contention is that the lower courts' decisions conflict with *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000). That is plainly incorrect. To the extent *Reeves* applies at all, the lower courts' decisions are consistent with it.

In *Reeves*, the plaintiff provided what the court of appeals acknowledged to be substantial evidence of pretext—sufficient evidence for a reasonable trier of fact to disbelieve the defendant's articulated explanation for its actions. *See id.* at 2103-04, 2107-08. In that circumstance, this Court held that it was error to rule that the defendant nonetheless was entitled to judgment as a matter of law. *Id.* at 2109.

The opposite circumstance existed in Coates' case. The District Court specifically found, "There is *absolutely no indication* that Virginia Power's offered legitimate non-discriminatory explanation for their action is pretextual." (16a (emphasis supplied)). Similarly, the Court of Appeals stated, "Coates adduced *no evidence* that indicates Virginia Power's explanation is a pretext for discriminatory conduct or was racially motivated in any way." (6a (emphasis supplied)).

Reeves does not change the outcome when, as here, the plaintiff cannot prove pretext; the plaintiff's claim still should be dismissed on summary judgment. "*Reeves* only helps [plaintiff] if she has produced sufficient evidence to reject the legitimate explanation. She has not, so *Reeves* does not mandate reversal." *Taylor v. QHG of Springdale, Inc.*, 218 F.3d 898, 900-01 (8th Cir. 2000) (affirming summary judgment for defendant). *Accord, e.g.*, *Williams v. Raytheon Co.*, 220 F.3d 16, 19 (1st Cir. 2000) (affirming summary judgment and distinguishing *Reeves* where plaintiff made no showing that defendant's reason was false); *Vadie v. Mississippi State Univ.*, 218 F.3d 365, 373 n.23 (5th Cir. 2000) (reversing denial of defendant's motion for judgment as a matter of law and finding *Reeves* inapplicable due to lack of evidence of pretext); *Foster v. AlliedSignal Inc.*, 2000 Westlaw 1117466, at *2 (D. Kan. July 11, 2000) ("Further, plaintiff failed to provide sufficient evidence for a trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reasons for its decision to terminate plaintiff's employment. *Reeves* is, therefore, inapplicable to this case.").

It is true that in analyzing Coates' claim, the District Court and the Court of Appeals set forth the then-current standard in the Fourth Circuit: a plaintiff had to establish both that the defendant's articulated reason was pretextual and that the real reason was discrimination. (5a, 15a).[4] The lower courts then specifically found, however, that Coates completely failed to adduce any evidence of pretext as

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[4] It must be noted, however, that the lower courts did not suggest that the plaintiff would have to adduce *additional evidence* to satisfy the second prong of this standard.

required to satisfy the first prong of this standard. (6a, 16a). Thus, the second prong of the standard did not affect the analysis or the outcome. This simply was not a case, such as *Reeves*, in which the plaintiff demonstrated pretext but the lower court required more.

The District Court and the Court of Appeals carefully analyzed Coates' evidence to determine whether he had adduced "sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action." *Reeves*, 120 S. Ct. at 2103. Their analysis was entirely consistent with *Reeves*. As the lower courts properly held, where such evidence of pretext is lacking, the defendant is entitled to judgment in its favor as a matter of law.

II. The Lower Courts Properly Analyzed Coates' Evidence.

Coates' other contentions merely amount to various complaints about the way the lower courts analyzed the evidence he offered. These contentions do not raise any issue worthy of this Court's review on a petition for certiorari. Further, the contentions are not well founded; the lower courts analyzed the evidence properly and reached the right conclusion.

Coates complains, in effect, that the lower courts failed to review Virginia Power's termination decision to determine whether it was fair or whether it reflected the correct business judgment; instead, the lower courts merely analyzed whether the decision was discriminatory. Thus, the Court of Appeals stated,

> While Coates believes some of his appraisals were unfair, "we do not sit to appraise [the supervisor's] appraisal" of Coates. [*Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 280 (4th Cir. 2000)]. Instead, "'our sole concern is whether the reason for which the defendant discharged the plaintiff was discriminatory.'" *Id.* (quoting *DeJarnette* [*v. Corning, Inc.*,] 133 F.3d [293,] 299 [(4th Cir. 1998)]).

(7a). This approach is entirely appropriate, as many decisions from other Circuits reflect. *E.g.*, *Crim v. Board of Educ.*, 147 F.3d 535, 541 (7th Cir. 1998) ("Thus, we do not review the propriety of the Board's business decision . . . ; we consider only whether Dr. Crim proved that the reasons for that decision were pretextual because the Board did not honestly believe them."); *Connell v. Bank of Boston*, 924 F.2d 1169, 1173 n.4 (1st Cir.) ("We realize that plaintiff disagreed with many of his ratings and some negative written comments in the job performance appraisals. It is not our function, however, to evaluate the job appraisals where there is no evidence that they were motivated or slanted by age animus."), *cert. denied*, 501 U.S. 1218 (1991).

Consistent with this approach, the Court of Appeals followed the extensive line of cases holding that in determining whether a manager discriminated in assessing a plaintiff's job performance, the court focuses on the manager's perceptions, not the plaintiff's self-assessment. (7a). For example, in *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 280 (4th Cir. 2000), the Court noted,

> But instead of producing evidence that shows [the manager's] assessment of [plaintiff's] performance

> was dishonest or not the real reason for her termination—as the law requires—[plaintiff] disputes the merits of [the manager's] evaluations. . . . In doing so, [plaintiff] can prove only the unremarkable fact that she and [the manager] disagreed about the quality of her work. But we have repeatedly held that in a wrongful discharge action, "'it is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff.'" [citations omitted].

Again, the analysis the Fourth Circuit applies is entirely appropriate and is consistent with the approach in the other Circuits. *E.g.*, *Holifield v. Reno*, 115 F.3d 1555, 1565 (11th Cir. 1997) ("The inquiry into pretext centers upon the employer's beliefs, and not the employee's own perceptions of his performance. . . . Thus, where the employer produces performance reviews and other documentary evidence . . . that demonstrate poor performance, an employee's assertions of his own good performance are insufficient to defeat summary judgment, in the absence of other evidence."); *Gustovich v. AT&T Communications, Inc.*, 972 F.2d 845, 848 (7th Cir. 1992); *Billet v. CIGNA Corp.*, 940 F.2d 812, 825 (3d Cir.1991).

Contrary to Coates' hyperbolic assertion, the lower courts did not ignore competent evidence in his declaration because the Fourth Circuit has adopted some special rule to disregard the plaintiff's evidence. To the extent his declaration was disregarded, the District Court simply applied the established principle that a party cannot raise a genuine issue of material fact through an affidavit which contradicts his own deposition testimony or which sets forth conclusory or speculative assertions, as Coates' declaration did. (17a-18a).

E.g., *Darnell v. Target Stores*, 16 F.3d 174, 176-77 (7th Cir. 1994). Even when viewed in the light most favorable to him, however, the allegations in Coates' declaration do not support an inference that Travis discriminated against him in the pooling and selection process that led to his termination.

Finally, Coates seeks to raise an issue by mischaracterizing Fourth Circuit rulings that do not even apply to his circumstances. The Fourth Circuit has held that an adverse performance appraisal rating, by itself, does not constitute an adverse employment action within the purview of Title VII of the Civil Rights Act of 1964. *E.g.*, *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 755 (4th Cir.), *cert. denied*, 519 U.S. 818 (1996). These rulings are consistent with rulings in the other Circuits. "[Plaintiff] has not identified, nor have we discovered, a single case where adverse performance ratings alone were found to constitute adverse action." *Smart v. Ball State Univ.*, 89 F.3d 437, 442 (7th Cir. 1996). When a plaintiff has actually experienced an adverse employment action, such as a termination, based on an earlier adverse performance appraisal, these rulings do not, as Coates suggests, prevent the plaintiff from attempting to prove that the earlier appraisal was discriminatory.

Those rulings do not even apply to Coates, however,[5] because he never sought to challenge the appraisals by themselves; he did not assert any complaint until his termination. And, of course, when he asserted that complaint, those rulings did not prevent him from contending that his appraisals had been discriminatory. His contention failed

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[5] Indeed, in the proceedings below, neither of the parties and neither of the lower courts mentioned them at all.

instead because he lacked any evidence that the appraisals were, in fact, discriminatory. His argument about this line of cases is utterly frivolous.

The lower courts viewed the evidence in the light most favorable to Coates and gave him the benefit of every reasonable inference. Even in that light, his claim was based entirely on speculation and faulty assumptions. Travis did not prepare his KSAs which were used in the pooling process; Bushee did. Travis did not decide whether he would have a position in the reorganized Region; more than 20 Managers did. To the extent Travis was involved in the process that led to Coates' termination, there is no evidence that Travis took any action because of Coates' race. Most significantly, there is no evidence that any of the more than 20 Managers honestly believed Coates was the best candidate for one of the new positions but pretended to find him less suitable to cover up the Manager's real motivation of race discrimination.

Coates failed to adduce sufficient evidence to support a jury verdict in his favor as required by, *e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Thus, Virginia Power was entitled to judgment in its favor as a matter of law. Nothing about the lower courts' analysis was improper or unusual, and certainly nothing about their analysis warrants the exercise of this Court's discretionary jurisdiction.

CONCLUSION

Coates' Petition fails to satisfy the standard established in Supreme Court Rule 10 as to when this Court will exercise its discretionary jurisdiction. The lower courts' decisions were proper and do not raise any issue justifying this Court's review. The Petition should be denied.

Respectfully submitted,

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October 2, 2000

APPENDIX

In the Appendix to Coates' Petition, the reproductions of the opinions of the lower courts contain numerous errors. This Appendix provides corrections to the more significant or potentially confusing errors but does not correct every instance where, for example, italicization was removed or added in a reproduction or the punctuation in a citation was changed in a reproduction.

(page: line) Reproduction	Original
(4a:3) [footnote omitted]	[footnote:] * Coates's complaint initially contained two claims. However, in response to Virginia Power's motion for summary judgment, Coates asked the district court to "drop" the retaliation claim.
(9a:2) Summary Judgment Plaintiff alleges	Summary Judgment. Plaintiff alleges
(9a:12) In *1983.* Coates	In 1983, Coates
(10a:3) ranks at Virginia Power This paid	ranks at Virginia Power. This paid
(10a:8-9) dismissal from Power	dismissal from Virginia Power
(10a:19) KSA eating	KSA rating

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(12a:28) Coaxes	Coates
(13a:11) Travis However,	Travis. However,
(13a:13) Coaxes'	Coates'
(13a:23) fact. Fed. R Civ. P. 56(c).	fact. See Fed. R. Civ. P. 56(c).
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(14a:23) nor an onerous one	not an onerous one
(14a:32) plaintiff Halperin 128	plaintiff. See Halperin, 128
(14a:35) true." (quoting	true.'" Id. (quoting
(15a:2) cent. denied. 516 U.S. 94-4	cert. denied, 516 U.S. 944
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(16a:22) not did Travis	nor did Travis
(16a:22-23) (positive or negative about	(positive or negative) about
(17a:7) judgment 820	judgment, see Autry, 820
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